IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WARREN JACKSON, **Petitioner,** **v.** **UNITED STATES OF AMERICA,** **Respondent.**	**CRIMINAL ACTION NO. 03-793** **CIVIL ACTION NO. 06-4698**

MEMORANDUM AND ORDER

Katz, S.J. **February 26, 2007**

Petitioner has filed a pro se Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside, Or Correct Sentence By A Person In Federal Custody (Document No. 108) in which he asks the court to vacate the sentence imposed on him following his guilty plea on four grounds: (1) that the court erred in concluding that Petitioner was a "career offender" within the meaning of U.S.S.G. § 4B1.1, (2) that the court allegedly failed to give him an opportunity to challenge the prior convictions that made him a "career offender," (3) that his counsel was constitutionally ineffective for failing to challenge the court's conclusion that he was a "career offender," and (4) that the court erred in finding that he possessed a firearm within the meaning of U.S.S.G. § 2D1.1(b)(1).

The government argues that the Motion should be denied, because Petitioner waived, in his plea agreement, the right to appeal or collaterally attack his conviction and sentence. For the reasons set forth below, the court concludes that Petitioner knowingly and voluntarily waived his right to collaterally challenge his conviction and sentence, that enforcing the waiver would not work a miscarriage of justice, and that the waiver requires that the court deny the Motion. Therefore, the court will deny Petitioner's motion with prejudice, and will not recommend the issuance of a certificate of appealability ("COA") under 28 U.S.C. § 2253(c).[1] (Alternatively, the court will deny the motion with prejudice and will not recommend the issuance of a COA, because Petitioner's claims lack merit.)

---

[1] "At the time a final order denying a petition under 28 U.S.C. § 2254 or § 2255 is issued, the district judge shall make a determination as to whether a certificate of appealability should issue." Third Circuit Local Appellate Rule 22.2. Under 28 U.S.C. 2253(c)(2), a COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2) (2006). The Supreme Court has construed this language as follows:

> Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. The issue becomes somewhat more complicated where, as here, the district court dismisses the petition based on procedural grounds. We hold as follows: When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Slack v. McDaniel, 529 U.S. 473, 484 (2000); see also Miller-El v. Cockrell, 537 U.S. 322, 335–38 (2003).

I. Facts

On December 2, 2003, Petitioner was charged by sealed indictment with three offenses: (1) attempted distribution of crack, in violation of 21 U.S.C. §§ 846 and 841 (Count I), (2) possession of crack with intent to distribute, in violation of 21 U.S.C. § 841 (Count II), and (3) possession of a firearm and ammunition by a convicted felon, in violation of 18 U.S.C. § 922(g)(1) and 924(e) (Count III).

On February 28, 2005, Petition appeared before the court and, pursuant to a Guilty Plea Agreement, pled guilty to Counts I and II of the superseding indictment (which was filed on August 3, 2004, and which charged the same offenses as the original indictment) . Under the Guilty Plea Agreement, Petitioner agreed to, inter alia, the following with respect to his right to appeal or collaterally attack his sentence:

> 7. In exchange for the undertakings made by the government in entering this plea agreement, the defendant voluntarily and expressly waives all rights to appeal or collaterally attack the defendant's conviction, sentence, or any other matter relating to this prosecution, whether such a right to appeal or collateral attack arises under 18 U.S.C. § 3742, 28 U.S.C. § 1291, 28 U.S.C. § 2255, or any other provision of law.
>
> > a. Notwithstanding the waiver provision above, if the government appeals from the sentence, then the defendant may file a direct appeal of his sentence.

> b. If the government does not appeal, then notwithstanding the waiver provision set forth in this paragraph, the defendant may file a direct appeal but may raise only claims that:
>
> > 1. The defendant's sentence on any count of conviction exceeds the statutory maximum for that count as set forth in paragraph 4 above; or
> >
> > 2. The sentencing judge unreasonably departed upward from the otherwise applicable sentencing guideline range.
>
> If the defendant does appeal pursuant to this paragraph, no issue may be presented by the defendant on appeal other than those described in this paragraph.

Guilty Plea Agreement, ¶ 7.

At the plea hearing, the court thoroughly colloquied Petitioner pursuant to FED. R. CRIM. P. 11. During this colloquy, the court had the government summarize the contents of Petitioner's plea agreement, including the appellate/collateral attack rights waiver provision, and asked Petitioner if he understood the contents of the plea agreement; Petitioner answered "yes." Change of Plea Hearing Transcript at 11–13. In addition, right before the end of the hearing, the government asked the court to colloquy Petitioner specifically regarding the appellate/collateral attack rights waiver provision. Id. at 15–16. In so doing, the court specifically asked Petitioner the following question: "Do you

understand you are giving up your right to appeal from any conviction after trial and the only appeal from a guilty plea is if I imposed an illegal sentence or if there are any errors in this proceeding?" Id. at 16. Petitioner responded that he understood the limitations that the Guilty Plea Agreement placed on his right to appeal or collaterally attack his sentence. Id.

Petitioner was sentenced on May 26, 2005.[2] The court determined that Petitioner had two prior felony controlled substance convictions, and that he therefore qualified as a career offender under U.S.S.G. § 4B1.1(a). Since the maximum term of imprisonment for Petitioner's offense was 30 years,[3] Petitioner's offense level was 31[4] and the Guideline range was 188 to 235 months' imprisonment. The court imposed a sentence of 120 months, 68 months below the low end of the Guideline range. (Pursuant to the plea agreement, the parties had agreed not to recommend a sentence *below* 120 months' imprisonment. Id. at 12; Guilty Plea Agreement, ¶ 6(d).)[5]

Petitioner filed a notice of appeal on June 1, 2005. On October 11,

---

[2] In the Guilty Plea Agreement, the parties agreed that the Sentencing Guidelines Manual effective November 1, 2004 would govern this case. See Guilty Plea Agreement, ¶ 6.

[3] See 21 U.S.C. § 841(b)(1)(C) (2006).

[4] Petitioner also qualified for a 3-level downward adjustment under U.S.S.G. § 3E1.1.

[5] Had Petitioner not been deemed a "career offender," his Guideline range (for offense level 17 and criminal history category VI) would have been 51 to 63 months' imprisonment.

2005, upon motion of the government, the Third Circuit dismissed Petitioner's appeal for lack of jurisdiction based on the appellate/collateral attack rights waiver in the Guilty Plea Agreement, because the government had not appealed the court's sentence, because Petitioner's sentence did not exceed the statutory maximum, and because the court did not erroneously grant an upward departure.

On October 18, 2006, Petitioner filed the instant § 2255 motion. In the motion, Petitioner argues that his sentence should be vacated for four reasons: (1) because the court erred in concluding that Petitioner was a "career offender" within the meaning of U.S.S.G. § 4B1.1, (2) because the court allegedly failed to give him an opportunity to challenge the prior convictions that made him a "career offender," (3) because his counsel was constitutionally ineffective for failing to challenge the court's conclusion that he was a "career offender," and (4) because the court erred in finding that he possessed a firearm within the meaning of U.S.S.G. § 2D1.1(b)(1), thus qualifying Petitioner for a two-level upward adjustment.

II. Legal Standard

The law governing enforcement of waivers of appellate and collateral attack rights has been aptly summarized as follows:

When analyzing the validity of waiver provisions, courts treat waivers

> of appeal and waivers of collateral attack alike.[6] "[A]n ineffective assistance of counsel argument survives a waiver of appeal only when the claimed assistance directly affected the validity of that waiver or the plea itself." United States v. White, 307 F.3d 336, 343 (5th Cir. 2002) (referred to in United States v. Robinson, 2004 WL 1169112, *3 (E.D. Pa. Apr. 30, 2004)). In the Third Circuit, "waivers of appeals in plea agreements are generally enforceable."[7] United States v. Fagan, 2004 WL 2577553, *3 (E.D. Pa. Oct. 4, 2004). As articulated in United States v. Khattak, 273 F.3d 557 (3d Cir. 2001), "waivers of appeals are generally permissible if entered into knowingly and voluntarily," unless there is "an unusual circumstance where an error amounting to a miscarriage of justice may invalidate the waiver." Id. at 558, 562 (citing United States v. Teeter, 257 F.3d 14, 25 (1st Cir. 2001)). Waivers of appeals should be strictly construed. Id. at 562.

United States v. Perez, No. 06-2923, 2006 WL 3300376, at *3 (E.D. Pa. Nov. 9, 2006).

III. Discussion

Applying the above-cited standard, the court concludes that Petitioner knowingly and voluntarily agreed to the waiver provision in his Guilty Plea Agreement, and that enforcing this waiver would not work a miscarriage of justice. Therefore, Petitioner's waiver forecloses the instant Motion. However,

---

[6] See Jones v. United States, 167 F.3d 1142, 1145 (7th Cir. 1999) (referred to in United States v. Robinson, 2004 WL 1169112, *3 (E.D. Pa. Apr. 30, 2004)). The Jones court noted that, with respect to whether "a waiver of the right to bring a collateral attack pursuant to § 2255 bars a challenge based on ineffective assistance of counsel or involuntariness . . . there is no principled means of distinguishing a § 2255 waiver from a waiver of appeal rights." Id.

[7] Eleven other circuits follow this rule. Fagan, 2004 WL 2577553 at *3 (collecting cases).

even if that were not the case, Petitioner's arguments are meritless. Consequently, the motion will be denied with prejudice.

A. The Waiver Provision Is Valid and Enforceable.

The trial court's plea colloquy under FED. R. CRIM. P. 11 is critical in determining whether Petitioner's waiver of appellate and collateral attack rights was knowing and voluntary. See Khattak, 273 F.3d at 563. Before the court could accept Petitioner's guilty plea, Rule 11 required the court to address Petitioner personally and determine whether Petitioner understood the waiver of appellate and collateral attack rights in his plea agreement. In assessing the efficacy of this colloquy, the court "was entitled to rely upon the defendant's sworn statements, made in open court . . . that he understood the consequences of his plea, had discussed the plea with his attorney, knew that he could not withdraw the plea, [and] understood that he was waiving his right to appeal [his] sentence." United States v. Hernandez, 242 F.3d 110, 112 (2d Cir. 2001).

The record in this case shows that Petitioner's waiver of appellate and collateral attack rights was knowing and voluntary. As noted above, at the plea hearing, the court engaged in an extensive colloquy with Petitioner pursuant to FED. R. CRIM. P. 11. During this colloquy, the court had the government summarize the contents of Petitioner's plea agreement, including the

appellate/collateral attack rights waiver provision, and asked Petitioner if he understood the contents of the plea agreement; Petitioner answered "yes." Change of Plea Hearing Transcript at 11–13. In addition, right before the end of the hearing, the government asked the court to colloquy Petitioner specifically regarding the appellate/collateral attack rights waiver provision. Id. at 15–16. In so doing, the court specifically asked Petitioner the following question: "Do you understand you are giving up your right to appeal from any conviction after trial and the only appeal from a guilty plea is if I imposed an illegal sentence or if there are any errors in this proceeding?" Id. at 16. Petitioner responded that he understood the limitations that the Guilty Plea Agreement placed on his right to appeal and collaterally attack his sentence. Id. Thus, the court's compliance with Rule 11 ensured that Petitioner's waiver of his right to collaterally attack his sentence was knowing and voluntary. See United States v. Copes, No. 04-384-01, 2005 WL 2084351, at *3 (E.D. Pa. Aug. 26, 2005); United States v. King, 2005 WL 914745, at *1–2 (E.D. Pa. Apr. 18, 2005).

The court also concludes that this case involves no "unusual circumstance where an error amounting to a miscarriage of justice may invalidate the waiver." Khattak, 273 F.3d at 562. In determining whether a case involves a waiver-invalidating miscarriage of justice, the court weighs several factors,

including "the clarity of the error, its gravity, its character, . . . the impact of the error on the defendant, the impact of correcting the error on the government, and the extent to which the defendant acquiesced in the result." Id. at 563 (quoting Teeter, 257 F.3d at 25–26). The court also considers whether the alleged error is one that the petitioner "knowingly and intelligently waived his right to present by proceeding as he did in the district court." United States v. Joiner, 183 F.3d 635, 645 (7th Cir. 1999) (explaining that an appellate/collateral attack rights waiver would not foreclose a claim that the petitioner did not voluntarily assent to the waiver, that the petitioner's assent resulted from ineffective assistance of counsel, or that the trial judge illegally sentenced the petitioner).

None of Petitioner's four claims for relief establishes a waiver-invalidating miscarriage of justice, because none is meritorious (as explained below in Section III.B) or casts doubt on the fact that Petitioner knowingly and voluntarily waived his rights to appeal and collaterally attack his conviction and sentence. The court therefore holds that the appellate/collateral attack rights waiver in Petitioner's plea agreement precludes the court from considering Petitioner's motion.

B. Petitioner's Claims Lack Merit.

Petitioner's motion argues that his sentence should be vacated for

four reasons: (1) because the court erred in concluding that Petitioner was a "career offender" within the meaning of U.S.S.G. § 4B1.1, (2) because the court allegedly failed to give Petitioner an opportunity to challenge the prior convictions that made him a "career offender," (3) because his counsel was constitutionally ineffective for failing to challenge the court's conclusion that Petitioner was a "career offender," and (4) because the court erred in finding that Petitioner possessed a firearm within the meaning of U.S.S.G. § 2D1.1(b)(1), thus qualifying Petitioner for a two-level upward adjustment. As explained below, all of these arguments lack merit.

1. Petitioner's Status as a "Career Offender" Under U.S.S.G. § 4B1.1

Under U.S.S.G. § 4B1.1(a),

> A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

U.S.S.G. § 4B1.1(a) (2004). To facilitate the court's analysis of the Petitioner's eligibility for "career offender" status, the Defendant's five prior felony controlled

substance convictions are described below:[8]

(1) CP# 9305-1727
    - Arrested March 24, 1993
    - Sentenced August 19, 1994 to 1 to 2 years in prison;
(2) CP# 9312-1609
    - Arrested December 1, 1993
    - Sentenced June 16, 1993 to 1 to 2 years in prison;
(3) MC# 9802-0101
    - Arrested February 2, 1998
    - Sentenced July 9, 1998 to 1 year of probation
(4) CP# 9901-0858
    - Arrested July 21, 1998
    - Sentenced August 11, 1999 to 6 months to 1 year in prison
(5) CP# 9907-1003
    - Arrested May 27, 1999
    - Sentenced August 11, 1999 to 6 months to 1 year in prison

Petitioner's Memorandum of Law, Exhibit A.

The court did not err in considering Petitioner a career offender under § 4B1.1(a), because Petitioner satisfied § 4B1.1(a)'s three requirements. First, Petitioner was born in 1970, so he was more than 18 years old when he committed the above-listed felonies. Second, Petitioner's offenses of conviction – attempted distribution of crack and possession of crack with intent to deliver (in violation of 21 U.S.C. §§ 841 and 846 – are "controlled substance" felonies within the

[8] All of these are convictions for unlawful delivery of or possession with intent to deliver powder cocaine or crack cocaine, in violation of 35 P.S. § 780-113(a)(30), so they qualify as "controlled substance offenses" for purposes of U.S.S.G. § 4B1.1(a). See U.S.S.G. § 4B1.2(b); 35 P.S. § 780-113(f) (detailing the possible sentences for violations of 35 P.S. § 780-113(a)(30) that involve powder or crack cocaine, all of which authorize imprisonment for more than one year).

meaning of § 4B1.1(a). Third, Petitioner has at least two prior controlled substance felony convictions.

Petitioner's motion argues on several grounds that his prior controlled substance felony convictions should not count toward satisfying the third prong of § 4B1.1(a). All of these arguments fail.

First, Petitioner argues that convictions (1) and (2) should count as only one prior controlled substance felony conviction, because, although they were not formally consolidated for sentencing, the judge in case (1) imposed exactly the same sentence as the judge in case (2), with the sentences to run concurrently. In support of this argument, Petitioner cites U.S.S.G. § 4A1.2(a)(2) and Application Note No. 3 to U.S.S.G. § 4A1.2. U.S.S.G. § 4A1.2(a)(2) says that "[p]rior sentences imposed in related cases are to be treated as one sentence." U.S.S.G. § 4A1.2(a)(2) (2004). Application Note No. 3 explains the concept of "related cases" as follows:

> Prior sentences are not considered related if they were for offenses that were separated by an intervening arrest (i.e., the defendant is arrested for the first offense prior to committing the second offense). Otherwise, prior sentences are considered related if they resulted from offenses that (A) occurred on the same occasion, (B) were part of a single common scheme or plan, or (C) were consolidated for trial or sentencing.

In interpreting this language, the Third Circuit has rejected Petitioner's arguments.

It has held that two cases are not "related" within the meaning of U.S.S.G. § 4A1.2(a)(2) simply because concurrent sentences were imposed, see United States v. Davis, 929 F.2d 930, 934 (3d Cir. 1991), and that two cases can never be related where, as here, they are separated by intervening arrests.[9] See United States v. Hallman, 23 F.3d 821, 824–25 (3d Cir. 1994) (citing United States v. Gallegos-Gonzalez, 3 F.3d 325, 327 (9th Cir. 1993)). The court therefore rejects Petitioner's argument that convictions (1) and (2) should count as only one prior controlled substance felony conviction for purposes of U.S.S.G. § 4B1.1(a).[10]

Second, Petitioner argues that convictions (3), (4), and (5) should not count as prior controlled substance felony convictions for purposes of § 4B1.1(a), because in each of those cases Petitioner was sentenced to less than 1 year in prison. To support this argument, Petitioner cites United States v. Shoupe, 929 F.2d 116, 121 n.3 (3d Cir. 1991). The court rejects this argument, because the Third Circuit has disavowed as dictum the language in Shoupe that supports Petitioner's position:

> In [United States v. McAllister, 927 F.2d 136, 138 (3d Cir. 1991)], we clearly indicated that the actual sentence imposed does not determine

---

[9] Petitioner was arrested in case (1) on March 24, 1993, and in case (2) on December 1, 1993.

[10] The court could end its analysis at this point, but it will consider and reject Petitioner's remaining arguments relating to his status as a career offender under U.S.S.G. § 4B1.1(a).

whether a prior conviction should be counted for purposes of § 4B1.1.

[Defendant] nevertheless argues that because he received only 90 days, his burglary was not "punishable" by more than one year and therefore should not have been counted. [Defendant] relies on footnote 3 in Shoupe I, 929 F.2d at 121 n.3. In Shoupe I, the defendant argued that because his prior convictions had involved cooperation with authorities, the district court had properly departed downward. We disagreed and remanded, noting that only the government may move for a departure based upon cooperation. In footnote 3, we remarked:

> Moreover, the career offender guideline already incorporates a considered decision by the Commission regarding the way in which cooperation for prior offenses generally should be taken into account. Under the career offender guideline, only those convictions resulting in prison sentences exceeding one year are counted. Sections 4B1.1, 4B1.2 and Application Note 3. If a defendant provided cooperation before sentencing for a prior offense, the sentence imposed for that offense presumably reflects consideration of that cooperation to whatever degree the sentencing court felt was appropriate. If the prior conviction resulted in a sentence of less than one year in light of cooperation, that prior conviction is not counted under the career offender guideline. Conversely, if the prior conviction resulted in a sentence exceeding one year despite cooperation, that prior conviction is counted. This scheme takes past cooperation into account, but it does not call upon a federal court applying the career offender guideline to perform the daunting task of making a new assessment of cooperation furnished in relation to past offenses. Because this scheme already takes past cooperation into account, departure based on past cooperation is generally not permissible. But see

Section 4A1.3.

Id. at 121 n.3.

> This footnote does not aid [Defendant] because it is dictum, that is, it contains propositions not essential to the determination of Shoupe I. Moreover, it conflicts with the plain text of the Guidelines, with our precedent and with federal caselaw generally. We are therefore constrained to hold that the dictum of footnote 3 in Shoupe I is not and has never been law in this court and therefore never achieved the jurisprudential quality of a decision.

United States v. Ricks, 5 F.3d 48, 50 (3d Cir. 1993) (internal citations and quotations omitted); see also U.S.S.G. § 4B1.2(b) (2004) (defining "controlled substance offense" as "an offense under federal or state law, punishable by imprisonment for a term exceeding one year . . . .").

Third, Petitioner argues that convictions (4) and (5) should not count as prior controlled substance felony convictions for purposes of § 4B1.1(a), because those convictions resulted from unknowing and involuntary guilty pleas taken in violation of Boykin v. Alabama, 395 U.S. 238 (1969) – pleas which Petitioner made after receiving allegedly ineffective assistance of counsel (in violation of Strickland v. Washington, 466 U.S. 668 (1984)). The court need not reach this argument, because Daniels v. United States, 532 U.S. 374 (2001) prevents Petitioner from challenging these convictions on this basis.

In Daniels, the defendant was in a situation much like Petitioner's.

After being convicted of unlawful possession of a firearm, the district court enhanced Daniels' sentence on the ground that he had more than three prior violent felony convictions. 532 U.S. at 376–77. After his conviction became final, Daniels filed a § 2255 motion to correct his sentence on the grounds that two of his prior violent felony convictions were the product of guilty pleas that were not knowing and voluntary, and that one of those two convictions also resulted from ineffective assistance of counsel. Id. at 377. In affirming the lower courts' denial of Daniels' § 2255 motion, the Court articulated the following rule:

> [I]f, by the time of sentencing . . ., a prior conviction has not been set aside on direct or collateral review, that conviction is presumptively valid and may be used to enhance the federal sentence. This rule is subject to only one exception: If an enhanced federal sentence will be based in part on a prior conviction obtained in violation of the right to counsel, the defendant may challenge the validity of his prior conviction during his federal sentencing proceedings. No other constitutional challenge to a prior conviction may be raised in the sentencing forum.
>
> After an enhanced federal sentence has been imposed . . ., the person sentenced may pursue any channels of direct or collateral review still available to challenge his prior conviction. . . . If any such challenge to the underlying conviction is successful, the defendant may then apply for reopening of his federal sentence. . . .
>
> If, however, a prior conviction used to enhance a federal sentence is no longer open to direct or collateral attack in its own right because the defendant failed to pursue those remedies while they were available (or because the defendant did so unsuccessfully), then that defendant is without recourse. The presumption of validity that

> attached to the prior conviction at the time of sentencing is conclusive, and the defendant may not collaterally attack his prior conviction through a motion under § 2255. *A defendant may challenge a prior conviction as the product of a Gideon violation in a § 2255 motion, but generally only if he raised that claim at his federal sentencing proceeding.*

Id. at 382 (internal citations omitted) (emphasis added).

Petitioner's argument that convictions (4) and (5) should not count as prior controlled substance felony convictions because of invalid guilty pleas and ineffective assistance of counsel is presumptively (and probably conclusively) barred by Daniels, because Petitioner failed to raise these arguments at his sentencing hearing, thus waiving them. Moreover, Petitioner was sentenced in both cases on August 11, 1999; the court is not aware of any appeals or collateral attacks filed by Petitioner with respect to these convictions and suspects that any appeal or collateral attack is now time-barred. See 28 U.S.C. § 2244 (2006) (imposing a 1-year period of limitation on federal habeas corpus actions under 28 U.S.C. § 2254, which usually runs from the date the state conviction became final, and which is tolled during the pendency of any collateral attack in state court); 42 PA. C.S.A. § 9545(b) (imposing a similar 1-year period of limitation on post-conviction relief actions); PA. R. CRIM. P. 720(A) (requiring that a convicted defendant file his notice of appeal within 30 days after being sentenced or after the

denial of his timely post-sentence motion); see also Lee v. United States, No. 99-0356, 2006 WL 680943 (E.D. Pa. Mar. 14, 2006). The court therefore concludes that it properly considered Petitioner a "career offender" within the meaning of U.S.S.G. § 4B1.1(a).

2. Petitioner's Due Process Claim

Petitioner also argues that his sentence should be vacated, because the court allegedly violated his due process rights by failing to give him an opportunity to challenge the prior convictions that made him a "career offender" under U.S.S.G. § 4B1.1(a). This argument is meritless. At the sentencing hearing, both Petitioner and his counsel had ample opportunity to object to Petitioner's classification as a "career offender," and they took advantage of this opportunity to advance the first and second arguments rejected in Section III.B.1, supra. See Sentencing Hearing Transcript at 8–22. Their failure to bring up the third argument, which Petitioner attributes to ineffective assistance of counsel, does not constitute a denial of due process.

3. Petitioner's Ineffective Assistance Claim

Petitioner further argues that his sentence should be vacated, because his counsel was constitutionally ineffective for failing to challenge the court's conclusion that he was a "career offender" (on the ground that convictions (4) and

(5) resulted from unknowing and involuntary guilty pleas that Petitioner made after receiving allegedly ineffective assistance of counsel).

The law governing ineffective assistance of counsel claims has been summarized as follows:

> Claims of ineffective assistance are analyzed under the two-part test articulated in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to merit habeas relief due to the ineffectiveness of counsel, petitioner must establish that (1) counsel's performance fell well below an objective standard of reasonableness, and (2) counsel's deficient performance prejudiced the defendant, resulting in an unreliable or fundamentally unfair outcome of the proceeding.

Williams v. Brooks, 435 F. Supp. 2d 410, 425 (E.D. Pa. 2006) (internal citation omitted). The court rejects Petitioner's ineffective assistance of counsel claim, because the court's rejection of his underlying challenge to convictions (4) and (5) in Section III.B.1, supra, means that Petitioner cannot satisfy the Strickland test.[11] See Strickland, 466 U.S. at 687; Parrish v. Fulcomer, 150 F.3d 326, 328 (3d Cir.

[11] Petitioner also may be alleging ineffective assistance of counsel on the ground that his counsel incompetently challenged the use of convictions (1), (2), and (3) to determine that Petitioner was a "career offender." To the extent this is the case, it is significant that, at the sentencing hearing, Petitioner's counsel challenged the use of those convictions using the exact same arguments Petitioner articulates in his motion. Compare Sentencing Hearing Transcript at 8–22 with Petitioner's Memorandum of Law at 2–3, 16–19. The court's rejection of those arguments (in Section III.B.1, supra) and its conclusion that those convictions properly counted to make Petitioner a career offender show that this claim is also meritless. See Strickland, 466 U.S. at 687; United States v. Lopez-Chapa, No. 02-03-4, 2004 WL 1376250, at *4–5 (E.D. Pa. June 4, 2004).

1998) ("[C]ounsel assistance does not become ineffective by failing to raise an issue when convincing Supreme Court case law shows it to be without merit.").

4. Petitioner's U.S.S.G. § 2D1.1(b)(1) Claim

Lastly, Petitioner argues that his sentence should be vacated, because the court erred in finding that Petitioner possessed a firearm within the meaning of U.S.S.G. § 2D1.1(b)(1), thus qualifying Petitioner for a two-level upward adjustment.[12, 13] This argument breaks down into four smaller arguments. First, Petitioner claims that, as a matter of law, he did not "possess" a gun while committing his offense of conviction, because he was arrested for selling drugs in the car of an undercover police officer, while the pistol at issue here was found under the driver's seat of the vehicle he drove to the rendezvous with the undercover officer.[14] Second, Petitioner says it is improper to apply the firearm

---

[12] Under U.S.S.G. § 2D1.1(b)(1), the defendant's offense level is increased by two levels "[i]f a dangerous weapon (including a firearm) was possessed." U.S.S.G. § 2D1.1(b)(1) (2004).

[13] The court observes that the validity vel non of this enhancement is almost certainly a moot point, since the application of the career offender enhancement means that Petitioner's offense level (i.e., 31) is far above what it would be (i.e., 17) if the firearm enhancement applied but the career offender enhancement did not. See U.S.S.G. § 4B1.1(b) (2004). Nevertheless, the court will show the error in Petitioner's argument, just in case it has erred in upholding its application of the career offender enhancement.

[14] According to the Presentence Investigation Report,

> [Petitioner and the undercover officer] agreed to meet at a gas station at Frankford and Lehigh Avenues. [Petitioner] arrived at the location in a black Taurus that was registered in [Petitioner's] name. When the officer arrived at the location,

enhancement where the government dropped the felon-in-possession-of-a-firearm charge (Count III) pursuant to the Guilty Plea Agreement. Third, Petitioner argues that his counsel was constitutionally ineffective for failing to challenge the application of the firearm enhancement. Fourth, Petitioner claims that the court erred under United States v. Booker, 543 U.S. 220 (2005) when it applied the enhancement even though no jury had found that Petitioner had possessed the pistol.

Petitioner's first argument is the only one that requires significant discussion. Application Note No. 3 to § 2D1.1(b)(1) explains the enhancement's purpose and broad reach:

> The enhancement for weapon possession reflects the increased danger of violence when drug traffickers possess weapons. The adjustment should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense. For example, the enhancement would not be applied if the defendant, arrested at his residence, had an unloaded hunting rifle in the closet.

Id. Petitioner argues that the loaded pistol found under the driver's seat of his car

---

> [Petitioner] got into his car and said "You wanted ten, right?" [Petitioner was then arrested inside the undercover officer's car and found to be in possession of crack cocaine.] Under the driver's seat [of Petitioner's car] police found a Bryco Arms, Jennings Nine, 9mm semiautomatic pistol, serial number 148571, loaded with eight live rounds of Lugar 9mm ammunition, including one live round in the chamber, and a box of 39 live rounds of 9mm ammunition.

Presentence Investigation Report, ¶¶ 8–10.

was not "present" when he tried to sell drugs to the undercover officer in the undercover officer's car (which was parked near Petitioner's car at a gas station), and that even if it was, it was "clearly improbable" that the pistol was connected to Petitioner's attempt to sell drugs. In support of his position, Petitioner cites United States v. Italiano, 818 F. Supp. 812 (E.D. Pa. 1992). In Italiano, the defendant and her partner were convicted for selling drugs out of the trunk of an inoperable car registered in the defendant's name. Id. at 813. Police found a semi-automatic rifle and 200 vials of crack in the car's trunk. Id. At sentencing, the defendant objected to the application of the § 2D1.1(b)(1) enhancement on the ground that, although she knew her partner owned the rifle, she was not aware that the rifle was in the trunk when she was arrested. Id. at 814. The Court agreed with the defendant and refused to apply the enhancement; it justified its decision as follows:

> The problem here is that the defendant did not possess the gun – it was merely in her car and while she admits that she knew her co-defendant owned a weapon, there was nothing to show she was aware of the fact that he had it in the car.
>
> She was not seen to go to the car or take anything from the trunk. While it is true the car was registered in her name, it was inoperable, and there was no evidence of how long the gun had been there. At most defendant may have been aware of its presence, but knowledge and possession are not the same. The guidelines penalize for the latter. The enhancement in the pre-sentence report was improper.

Id.

Italiano is distinguishable from this case, because the defendant in Italiano was working with a partner who owned the weapon at issue. Here, Petitioner was working alone, and does not disclaim ownership of the pistol. (Both the Italiano defendant and Petitioner owned the cars in which guns were found.)

Petitioner is therefore asking the court to reverse its application of the enhancement on two grounds: (1) that Petitioner was "unaware" of the loaded pistol's presence under the driver's seat, and (2) that the pistol's location precludes application of the enhancement. With regard to the first ground, the court accords it little weight, given the absence of any evidence, beyond Petitioner's assertion, that he was unaware of the pistol's presence. (The court suspects that few convicted drug dealers would admit to have knowingly possessed a firearm while committing their offenses of conviction.) As for the second ground, the case law construing § 2D1.1(b)(1) shows that it is no ground for reversing application of the enhancement in this case. See United States v. Drozdowski, 313 F.3d 819, 822 (3d Cir. 2002) (finding that the defendant "possessed" two *unloaded* handguns hidden underneath a desk in the defendant's

father's house where ammunition and drug paraphernalia were found nearby, and where the guns "were not so inaccessible as to make it clearly improbable that they had been used in connection with [the defendant's] drug offense"); United States v. DeJesus, No. 97-378-2, 2000 WL 217530, at *2–3 (E.D. Pa. Feb. 11, 2000) (holding that guns found at a "stash house" nine blocks away from the site of the drug transaction for which the defendant was convicted were "possessed" by the defendant within the meaning of § 2D1.1(b)(1)). Since Petitioner's loaded pistol was found in an accessible place (i.e., under his car's driver's seat) immediately after he had tried to sell drugs in a nearby car, Drozdowski and DeJesus show that the court did not err in applying the enhancement.

Petitioner's remaining arguments require little discussion. Contrary to Petitioner's contention, it was entirely proper for the court to apply the § 2D1.1(b)(1) enhancement after the government had dropped the felon-in-possession-of-a-firearm charge (under 18 U.S.C. §§ 922(g)(1) and 924(e)). See United States v. Johnson, 302 F.3d 139, 154–55 (3d Cir. 2002); cf. United States v. Goggins, 99 F.3d 116, 119 (3d Cir. 1996) (reaching the same conclusion where the defendant was found not guilty at trial on the underlying firearms charge)

Also contrary to Petitioner's contention, Petitioner's counsel was not constitutionally ineffective for failing to challenge the application of the §

2D1.1(b)(1) enhancement, because any such challenge would have been meritless. See Strickland, 466 U.S. at 687; Parrish, 150 F.3d at 328.

Finally, there is no merit to Petitioner's claim that the court erred under United States v. Booker, 543 U.S. 220 (2005) when it applied the § 2D1.1(b)(1) enhancement even though no jury had found that Petitioner had "possessed" the pistol. See Johnson, 302 F.3d at 155 (rejecting a similar Booker/Apprendi argument where, as here, the actual sentence imposed did not exceed the statutory maximum).

IV. Conclusion

For the foregoing reasons, the court will deny Petitioner's motion with prejudice, and a COA should not issue.[15]

An appropriate Order follows.

---

[15] Since the court correctly holds that a plain procedural bar – i.e., the appellate/collateral attack rights waiver in Petitioner's plea agreement – mandates the denial of Petitioner's motion, "a reasonable jurist could not conclude either that the district court erred in dismissing the [motion] or that the petitioner should be allowed to proceed further." Slack, 529 U.S. at 484. Therefore the court will not recommend the issuance of a COA under **28 U.S.C. 2253(c)**. With regard to the court's alternative denial with prejudice of Petitioner's motion on the merits, a COA should not issue, because "reasonable jurists would [not] find the district court's assessment of the [Petitioner's] claims debatable or wrong." Id.; see also Miller-El, 537 U.S. at 335–38.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WARREN JACKSON, **Petitioner,** **v.** **UNITED STATES OF AMERICA,** **Respondent.**	**CRIMINAL ACTION NO. 03-793** **CIVIL ACTION NO. 06-4698**

ORDER

AND NOW, this 26th day of February, 2007, upon consideration of Petitioner's pro se Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside, Or Correct Sentence By A Person In Federal Custody (Document No. 108), and the government's response thereto (Document No. 120), it is hereby **ORDERED** that:

1. Petitioner's Motion is **DENIED WITH PREJUDICE**; and

2. A certificate of appealability should not issue, because Petitioner has not made a substantial showing of the denial of a constitutional right, as required by 28 U.S.C. § 2253(c)(2).

BY THE COURT:

/s/ Marvin Katz

_____

MARVIN KATZ, S.J.